

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DAMIEN DREIS,

Plaintiff,

vs.

DEARBORN NATIONAL LIFE
INSURANCE COMPANY, a foreign
corporation,

Defendant.

Case No. 2:14-cv-00620-MJP

DEFENDANT’S MOTIONS *IN LIMINE*

NOTE ON MOTION CALENDAR:
August 14, 2015

I. INTRODUCTION AND RELIEF REQUESTED

Defendant Dearborn National Life Insurance Company (“Dearborn National”) moves *in limine* to exclude the following evidence:

1. Any testimony by James Healy.
2. All evidence, testimony, or argument of counsel about alleged “willful” withholding of wages of Plaintiff Damien Dreis (“Dreis”) by Dearborn National, or RCW 49.52.050–.070.
3. All evidence, testimony, or argument of counsel about alleged actions or statements of former Dearborn National employee Larry Meitl constituting the actions or statements of Dearborn National.
4. All evidence, testimony, or argument of counsel about severance offers made or

DEFENDANT’S MOTIONS *IN LIMINE* - 1

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1 severance paid by Dearborn National to any non-party individual.

2 5. All evidence, testimony, or argument of counsel about alleged hearsay statements
3 by Larry Meitl to non-party individuals about the nature or amount of severance payments to be
4 made by Dearborn National.

5 6. All evidence, testimony, or argument of counsel about alleged violations of the
6 policies of Dearborn National or Dearborn National parent company Health Care Service
7 Corporation (“HCSC”) by Dearborn National or Dearborn National employees.

8 7. All evidence, testimony, or argument of counsel about Dreis’s last day of
9 employment with Dearborn National being any day other than February 4, 2015.

10 8. All evidence, testimony, or argument of counsel about Dreis giving “two weeks’
11 notice” to Dearborn National.

12 9. Any reference to dispositive motions in this case or the Court’s rulings thereon.

13 10. The use of deposition transcript or video recording excerpts for any purpose other
14 than impeachment, including during opening statements and closing arguments, with the
15 exception of their use for impeachment, or for truly unavailable witnesses, or of Dearborn
16 National’s 30(b)(6) representative’s testimony, which may be used for any purpose.

17 II. LCR 7(d)(4) CERTIFICATION

18 Counsel for the parties conferred in good faith telephonically about every motion *in*
19 *limine* raised herein on July 23, 2015, and failed to reach agreement upon them. Declaration of
20 Thomas P. Holt (“Holt Decl. at ¶ 2).

21 III. FACTS

22 A. General Background

23 In this case, Dreis alleges that Dearborn National is liable to him for failing to pay him
24 severance as part of Dearborn National’s 2013 reduction-in-force (“RIF”), even though Dreis
25 resigned his employment at Dearborn National to work for a competitor, Guardian Life
26 Insurance Company, “effective today” on February 4, 2013, more than two weeks before any

1 comparable employees at Dearborn National were extended severance offers as part of the RIF.
2 According to Dreis, Dearborn National should be required to pay him severance regardless of his
3 voluntary resignation from the company because his former supervisor, Larry Meitl, allegedly
4 told him that any severance that Dearborn National might offer as part of the RIF would be
5 “minimal” or “two weeks max.” *See generally* Dearborn National’s Motion for Summary
6 Judgment (ECF No. 15) at 7:4–10:5. Mr. Meitl denies ever making any such statement. *Id.*

7 In Dreis’s Complaint, he originally asserted state law claims for (a) breach of contract
8 based on alleged violations by Dearborn National of its policies related to reductions in force
9 (actually, policies of its parent company HCSC applied by Dearborn National); (b) willful
10 wrongful withholding of wages; (c) breach of contractual duty of good faith and faith and fair
11 dealing; (d) fraud; and (e) negligent misrepresentation. *See* Complaint (ECF No. 1-2) at 4–6. In
12 the Court’s recent Order on the parties’ cross-motions for summary judgment, the Court
13 dismissed Dreis’s claims for breach of contract, breach of the contractual duty of good faith and
14 fair dealing, and for willful wrongful withholding of wages. (ECF No. 35.)

15 Accordingly, the only remaining claims in this lawsuit are Dreis’s claims for fraud and
16 negligent misrepresentation. Each of Dreis’s two claims must be proved under the “clear and
17 convincing” evidentiary standard. *Stiley v. Block*, 130 Wn.2d 486, 505, 925 P.2d 194 (1996);
18 *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 182, 876 P.2d 435 (1994).

19 The details surrounding Dreis’s remaining claims are discussed in depth in Dearborn
20 National’s Motion for Summary Judgment and summary judgment Reply (ECF No. 23), and the
21 Court is already familiar with them by virtue of its review of those filings. Dearborn National
22 incorporates those filings by reference here and will not repeat them.

23 **B. Facts Related to Plaintiff’s Witness James Healy**

24 Dreis identified witness James Healy in his initial disclosures in this case. Holt Decl.,
25 Ex. A, at 3. Accordingly, on January 26, 2015, Dearborn National noticed the deposition of Mr.
26 Healy, Ex. B to Holt Decl., and issued a valid subpoena for Mr. Healy to appear to be deposed

1 via videoconference at defense counsel's Denver offices on February 4, 2015. Holt Decl., Ex. C.
2 This subpoena was validly served on January 27, 2015. Ex. D to Holt Decl.

3 On January 30, 2015, Mr. Healy contacted defense counsel and requested that the date of
4 his deposition be moved, as he had a previously scheduled matter on February 4, 2015. Ex. E to
5 Holt Decl. That same day, the defense counsel contacted Mr. Healy and offered to reschedule
6 his deposition to February 16, 2015, to which Mr. Healy responded the following day, stating
7 that that date would work for him. Ex. F to Holt Decl.

8 Subsequently, defense counsel was informed by counsel for Mr. Dreis that they could not
9 be available for depositions on February 16, 2015, or indeed on any day during that week. Holt
10 Decl., ¶ 9. Accordingly, on February 2, 2015, defense counsel again contacted Mr. Healy and
11 requested to reschedule his deposition, this time for Friday, February 6, 2015. *Id.*; Holt Decl.,
12 Ex. G. The following day, defense counsel sent a follow-up email to Mr. Healy, requesting that
13 he respond. Ex. H to Holt Decl.

14 That same day, the legal assistant for defense counsel contacted Mr. Healy by telephone.
15 During their telephone conversation, Mr. Healy agreed to appear for his deposition on the
16 rescheduled date of February 6, 2015, at 3:30 p.m. MST, and further agreed to accept service of
17 an amended notice of deposition and amended deposition subpoena via email. Ex. I to Holt
18 Decl. Defense counsel subsequently served Mr. Healy with an amended deposition subpoena
19 compelling his attendance at his deposition on February 6, 2015, Ex. J to Holt Decl., and also
20 served opposing counsel and Mr. Healy with an amended notice of deposition for that date and
21 time. Ex. K to Holt Decl.

22 Notwithstanding his agreement to appear to be deposed on February 6, 2015, and his
23 express acceptance of service of a proper deposition subpoena for that date, when the time for his
24 deposition arrived, Mr. Healy simply failed to appear as scheduled. Holt Decl., ¶ 14. When
25 contacted, the sole explanation that Mr. Healy had for failing to appear as compelled by the
26 subpoena issued to him was that he had "lost [his] phone." *Id.* at ¶ 15.

1 Defense counsel subsequently attempted to reschedule a date for Mr. Healy's deposition
2 with Plaintiff's counsel, but was unable to find a mutually available time either prior to or soon
3 after the discovery cut-off in this case, which was February 16, 2015 (the parties had depositions
4 scheduled in Chicago throughout the week of February 9, 2015, and Plaintiff's counsel had
5 previously represented that they could not be available for any purpose during the week of
6 February 16, 2015). *Id.* at ¶ 16.

7 Dispositive motions in this case were due to be filed by March 2, 2015. (ECF Nos. 10,
8 13.) Accordingly, defense counsel was unable schedule a time to conduct the deposition of
9 James Healy prior to the filing of the parties' cross-motions for summary judgment. Holt Decl.
10 at ¶ 17. Notwithstanding this, accompanying his Partial Motion for Summary Judgment, Dreis
11 included a declaration of Mr. Healy. Ex. L to Holt Decl. (ECF No. 19.)

12 The purpose of this declaration was not to illuminate or discuss any facts that are actually
13 relevant to Mr. Dreis's claims, currently existing or otherwise, however. Rather, in this
14 declaration, Mr. Healy merely discussed statements that he alleges Mr. Meitl made about
15 severance that *he* (Mr. Healy) might expect to receive if he remained employed at Dearborn
16 National through Dearborn National's 2013 RIF, namely, that Mr. Meitl supposedly told him that
17 such a severance offer to Mr. Healy would be "insignificant." *Id.* at ¶ 4.

18 IV. AUTHORITY AND ARGUMENT

19 The Court has broad discretion to make "evidentiary rulings conducive to the conduct of
20 a fair and orderly trial." *Campbell Industries v. M/V Gemini*, 619 F.2d 24, 27 (9th Cir. 1980).
21 For the reasons discussed below, the Court should exercise its discretion to exclude the
22 categories of evidence and testimony set forth in the introduction of these motions.

23 A. Testimony by James Healy Is Improper Given Healy's Failure to Appear at 24 His Deposition, Would Be Unfairly Prejudicial, and Is Irrelevant

25 Plaintiff indicated in his pretrial statement that he intends to call former Dearborn
26 National employee James Healy as a witness who "will testify" in this case. Mr. Healy should

1 be excluded from testifying. As detailed above, Mr. Healy failed to comply with a properly
2 served subpoena to appear to be deposed by counsel for Dearborn National. Accordingly, under
3 Federal Rule of Evidence 403, any probative value that Mr. Healy's testimony might have would
4 be substantially outweighed by unfair prejudice to Dearborn National, given that,
5 notwithstanding its compliance with Federal Rule of Civil Procedure 45 and this Court's
6 discovery schedule, Dearborn National was precluded from exploring Mr. Healy's testimony by
7 virtue of Mr. Healy's failure to comply with a properly issued deposition subpoena.

8 Moreover, testimony by Mr. Healy would also be unfairly prejudicial to Dearborn
9 National in that his testimony fails to meet the relevancy standard of Federal Rule of Evidence
10 401. It has no probative value to any fact put at issue by Dreis's claims, yet is intended to
11 unfairly cast Dearborn National in an unfavorable light. Specifically, as demonstrated by Mr.
12 Healy's declaration offered in support of Dreis's motion for partial summary judgment, the *only*
13 reason that Dreis seeks to have Mr. Healy testify is because, prior to the 2013 reduction-in-force
14 at Dearborn, Larry Meitl allegedly told Mr. Healy that any severance Mr. Healy might receive
15 from Dearborn National would be "insignificant." Ex. L to Holt Decl. (ECF No. 19), ¶¶ 4-5.

16 Even if this were true, it has nothing to do with any of Mr. Dreis's potentially remaining
17 claims in this case. What Mr. Meitl might or might not have said to Mr. Healy does not make it
18 more or less likely that the completely independent statements that Mr. Dreis claims Mr. Meitl
19 made *to him* actually occurred. It has no bearing on such alleged statements to Dreis at all. And,
20 statements made to Mr. Healy are of no consequence to the determination of Dreis's claims,
21 which relate solely to what Dreis asserts Mr. Meitl said to him. *See* Fed. R. Evid. 401. Indeed,
22 the *only* reason Dreis seeks to introduce the testimony of Mr. Healy is to confuse the jury with
23 the improper and logically fallacious inference that because Mr. Meitl allegedly made statements
24 to Mr. Healy about severance payments, he also made such statements to Dreis.

25 The Court should exclude Mr. Healy from testifying at trial.
26

1 **B. The Court Should Exclude Evidence or Testimony about Alleged “Willful”**
2 **Violations of Washington’s Wage Statutes**

3 The Court has now dismissed Dreis’s claim for willful withholding of wages in violation
4 of Washington law. (ECF No. 35.) Accordingly, Dreis should not be permitted to introduce
5 evidence, and his counsel should not be permitted to present argument, about any aspect of the
6 statutes under which such a claim was raised, RCW 49.52.050–.070, or about any alleged
7 “willfulness” or “wrongful withholding” of wages that Dreis claims to be owed.

8 **C. Evidence Seeking to Portray Actions of Statements by Larry Meitl as Those**
9 **of Dearborn National Is Legally Erroneous and Unfairly Prejudicial**

10 Dreis should not be allowed to present testimony or argument of counsel to the effect that
11 unilateral actions taken by, and statements made by, former Dearborn National employee Larry
12 Meitl were actions taken by, or statements made by, Dearborn National as a corporation.
13 Allowing such testimony or argument would confuse the jury by conflating the unauthorized and
14 inaccurate alleged statements and actions of a single individual, Mr. Meitl, with those of
15 Dearborn National as a company.

16 The first reason that the Court should disallow such confusing and improper testimony
17 and argument is because, as a factual matter, alleged statements by Mr. Meitl regarding the
18 amount of severance that Dreis might expect as part of the RIF were neither based on actual
19 knowledge on the part of Mr. Meitl, nor were such statements authorized by Dearborn National.
20 To date, Dreis has been able to present *no* evidence that Mr. Meitl was so authorized.¹
21 Accordingly, allowing Dreis or his counsel to simply *assume* agency on the part of Dearborn
22 National by phrasing or describing the actions of Mr. Meitl as those of Dearborn National is
23 improper, and is simply legally erroneous.

24 ¹ In the Court’s Order on the parties’ cross-motions for summary judgment, viewing the evidence in the light most
25 favorable to Dreis, the Court concluded that the jury could find from circumstantial evidence that Mr. Meitl had
26 knowledge of Dearborn National’s severance calculations at the time Dreis alleges he made statements about
potential severance amounts Dreis might receive. However, notwithstanding the information Dreis points to as such
circumstantial evidence, Mr. Meitl has steadfastly denied any knowledge of severance calculations prior to receiving
his own severance offer, and Dreis has put forward no evidence that contradicts this unrefuted testimony.

1 Further, allowing Dreis to present the actions Mr. Meitl as being equivalent to (or simply
2 being the actions of) Dearborn National would unfairly prejudice Dearborn National in the eyes
3 of the jury. Such statements are nothing more than implicit legal argument by counsel as to the
4 disputed fact of Mr. Meitl's agency, and as such, have no probative value. At the same time,
5 they are likely to confuse and mislead the jury as to what Dearborn National's actual actions
6 were, causing unfair prejudice to Dearborn National. *See* Fed. R. Evid. 403.

7 Dearborn National is aware that the Court has ruled that Mr. Meitl's agency with respect
8 to his alleged statements to Dreis is a disputed issue for trial. (*See* ECF No. 35.) But Dreis and
9 his counsel should not be allowed to assume that which they are required to prove—the fact of
10 actual or apparent authority on the part of Mr. Meitl to make representations on Dearborn
11 National's behalf regarding the nature or amount of severance payments to be made as part of the
12 2013 RIF.

13 The Court should direct Dreis and his counsel not to refer to the statements or actions of
14 Mr. Meitl as statements or actions by Dearborn National itself.

15 **D. Evidence about Severance Offered or Paid to Third Parties Is Irrelevant and**
16 **Unfairly Prejudicial**

17 Dreis should be prohibited from presenting evidence or argument about what third parties
18 received as severance from Dearborn National as part of the 2013 RIF. First, such evidence has
19 no relevance to Dreis's only extant claims, i.e., that Dearborn National was somehow negligent
20 or committed fraud by failing to pay Dreis severance even though he knowingly and
21 intentionally resigned to work for a competitor more than two weeks before Dearborn National
22 made any severance offers to employees as part of the 2013 RIF.

23 Liability in tort for negligence resulting from the *affirmative* misrepresentation as to an
24 existing fact may be found only if a person “who, in the course of his business, profession or
25 employment, or in any other transaction in which he has a pecuniary interest, supplies false
26 information for the guidance of others in their business transactions.” Restatement (Second) of

1 Torts (“Restatement”) § 552(1). Payments made by Dearborn to third parties as consideration
2 for a release for liability as part of its 2013 RIF have *no relevance whatsoever* on any element of
3 this legal test. Fed. R. Evid. 401.

4 Similarly, liability in tort for negligent *failure to disclose* an existing fact can only be
5 found “in a quasi-fiduciary relationship, when (1) a special relationship of trust and confidence
6 exists between the parties; (2) one party relies upon the superior specialized knowledge and
7 experience of the other; (3) the seller has knowledge of a material fact unknown to the buyer;
8 and (4) there exists a statutory duty to disclose.” *Richland Sch. Dist. v. Mabton Sch. Dist.*, 111
9 Wn. App. 377, 386, 45 P.3d 580 (2002). Again, payments made by Dearborn National to third
10 parties have absolutely nothing to do with any of these necessary legal elements, and have no
11 value in making their existence any more or less likely. Fed. R. Evid. 401.

12 Finally, with respect to Dreis’s fraud claim, “[t]he nine elements of fraud are: (1)
13 representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker’s knowledge of its
14 falsity; (5) intent of the speaker that it should be acted upon by the plaintiff; (6) plaintiff’s
15 ignorance of its falsity; (7) plaintiff’s reliance on the truth of the representation; (8) plaintiff’s
16 right to rely upon it; and (9) damages suffered by the plaintiff.” *Stiley v. Block*, 130 Wn.2d 486,
17 505, 925 P.2d 194 (1996). Again, payments to third parties have no bearing on any of these
18 elements. Fed. R. Evid. 401.

19 At the same time, the introduction of evidence related to severance amounts paid to third
20 parties would create a very real risk of unfair prejudice to Dearborn National, insofar as it could
21 create (and could be intended to create) unwarranted sympathy on the part of jurors that has no
22 bearing on the merits of the issues at trial. Specifically, such evidence could create the
23 impression that because affected individuals who *were* employed by Dearborn National at the
24 time of the RIF were provided with severance payments, Dreis should *also* have received such a
25 payment—even though Dreis knew perfectly well that his resignation would disqualify him from
26 receiving one.

1 The Court should exclude evidence and argument of severance offered or paid to
2 individuals who are not party to this lawsuit.

3 **E. The Court Should Exclude Evidence about Purported Statements by Larry**
4 **Meitl to Third Parties Regarding Severance as Prohibited Hearsay**

5 Based on Dreis's deposition and statements by his counsel, Dearborn National believes
6 that Dreis may seek to testify, or otherwise introduce evidence, that purports to convey what
7 Larry Meitl may have said to third parties about severance that they might expect to receive as
8 part of the 2013 RIF. This would be testimony not directly by Dreis about what Mr. Meitl
9 purportedly said to *him*, but rather testimony about supposed statements that Mr. Meitl made to
10 third party individuals that were in turn conveyed to Dreis *by those individuals*. As such, it
11 would be offered in order to prove the truth of the matter asserted (i.e., that Mr. Meitl made
12 certain statements to the declarant(s)), and thus is classic hearsay for which no exception applies.
13 Fed. R. Evid. 801(c)(2). In particular, it would not even arguably fall under the exception for
14 statements of a party opponent, because the declarant would not be Mr. Meitl, but rather the third
15 party to whom Mr. Meitl supposedly spoke.² Such testimony is inherently unreliable, as
16 Dearborn National had no way to explore its veracity with the undisclosed potential declarants.

17 The Court should exclude any proffered hearsay evidence about what Larry Meitl (or
18 anyone else) made to non-testifying third parties about the nature or amount of severance
19 payments to be made by employees affected by the 2013 RIF.

20 **F. Evidence about Purported Violations of HCSC Policies by Dearborn**
21 **National Is Irrelevant to Any Extant Claim and Is Unfairly Prejudicial**

22 Through the course of this litigation, Dreis has sought to claim that Dearborn National
23 deviated from its policies governing reductions in force and the payment of severance benefits to

24 ² Dearborn National contends that *no* statement by Larry Meitl can be considered to be a statement of a party
25 opponent, given that Mr. Meitl had neither actual nor apparent authority to make representations about the nature or
26 amount of severance Dearborn might offer to employees affected by the 2013 RIF. The Court need not address this
issue in ruling on this motion *in limine*, however, as Mr. Meitl would not be the relevant declarant. *See* Fed. R.
Evid. 801(b).

1 employees affected by such reductions. To the extent Dreis had extant claims for breach of
2 contract or breach of the contractual duty of good faith and fair dealing based on the alleged
3 contractual nature of Dearborn National's employment policies, such arguments made sense.
4 However, Dreis has admitted that the claims of this nature originally asserted in his Complaint
5 are without merit, and the Court has subsequently dismissed them. (ECF No. 35.)

6 Indeed, when deposed, Dreis admitted that he had never even seen one policy that he
7 claimed in his Complaint Dearborn National violated until more than 10 months after he
8 resigned, when counsel for HCSC sent it to his lawyers in response to a demand letter. *See*
9 Defendant's Motion for Summary Judgment (ECF No. 15) at 13:11–14:3. He also admitted that
10 he had never seen the other policy that he alleged Dearborn violated *until the day of his*
11 *deposition*. *Id.* at 14:3–10. And, he also admitted that, during his employment, he read the
12 prominent disclaimer applicable to all Dearborn National and HCSC policies explicitly making
13 clear that none of those policies was contractual in nature. *Id.* at 14:11–24.

14 The only other conceivable relevance that such alleged policy violations might have had
15 to this case was Dreis's convoluted argument that, even though he resigned "effective today" on
16 February 4, 2013, he nonetheless somehow continued to be a Dearborn National employee until
17 February 19, 2013, the date Dearborn National extended severance offers to employees affected
18 by the 2013 RIF. This argument was made in relation to Dreis's claim that he should be able to
19 seek double damages for alleged "willful" withholding of wages under RCW 49.52.050–.070.
20 But, the Court has now rejected this argument (ECF No. 35 at 15–16), and has dismissed Dreis's
21 claim for unlawful wage withholding. Accordingly, Dearborn National's supposed violations of
22 its internal policies have no relevance to any remaining claim in this action.

23 At the same time, testimony or argument related to supposed violations by Dearborn
24 National of its internal policies poses a very real risk of unfairly prejudicing the jury.
25 Specifically, such arguments could give the jury a mistaken and misleading understanding that
26 Dearborn National unfairly administered the 2013 RIF, and create negative impressions of

1 Dearborn National on that basis. In addition to having no basis in fact, and being highly and
2 unfairly prejudicial to Dearborn National, such argument and testimony is, again, irrelevant to
3 any extant claim in this case. Dreis was not employed by Dearborn National when the RIF was
4 administered—he had voluntarily and intentionally resigned more than two weeks prior. Thus,
5 Dearborn’s handling of the RIF itself has nothing to with Dreis or his claims.

6 Accordingly, argument and evidence related to supposed violations of policy by
7 Dearborn National have no relevance to any issue of consequence to the determination of this
8 action, and should be excluded as irrelevant and unfairly prejudicial. Fed. R. Evid. 401, 402, 403.

9 **G. Dreis Should Not Be Permitted to Testify Contradicting His Unambiguous**
10 **Admission that His Last Day at Dearborn National Was February 4, 2015**

11 When deposed, Dreis expressly admitted that it had always been his understanding that
12 his last day of work at Dearborn National had been February 4, 2013. *See* Defendant’s Motion
13 for Summary Judgment (ECF No. 15) at 12:13–18. Indeed, Dreis admitted that as of February 5,
14 2013, he had already started a new job at Guardian Life Insurance Company. *Id.* Dreis should
15 not now be allowed to testify in direct contradiction of this unambiguous prior testimony. In
16 addition to being a directly contradictory to his statements made under oath, testimony or
17 argument of counsel to the effect that Dreis somehow remained employed by Dearborn National
18 beyond his final day of work is irrelevant to any extant claim. Specifically, again, the
19 unsupported claim that Dreis someone remained a Dearborn National employee after he resigned
20 “effective today” on February 4, 2013, related solely to Dreis’s unfounded theory offered in
21 support of his willful wage withholding claim. The Court has rejected that theory, and dismissed
22 that claim. Moreover, this testimony and argument has the potential to confuse to the jury,
23 insofar as it could give the erroneous impression that some right by Dreis to a severance payment
24 from Dearborn National could have arisen for some reason other than the claims still at issue.

25 The Court should exclude all evidence and testimony to the effect that Dreis’s continued
26 his employment at Dearborn National beyond February 4, 2013. Fed. R. Evid. 401, 402, 403.

1 **H. Dreis Should Not Be Permitted to Testify that He Gave “Two Weeks’ Notice”**
2 **When that Purported Notice Was Given After His Last Day of Work**

3 For reasons identical to those set forth above in relation to Dreis’s last day at Dearborn
4 National being any day other than February 4, 2013, the Court should also exclude all testimony
5 and argument that Dreis gave “two weeks’ notice” when he sent a revised resignation letter to
6 Larry Meitl on February 5, 2013, from his work computer at Guardian Life Insurance Company.
7 Fed. R. Evid. 401, 402, 403.

8 **I. The Court Should Exclude Evidence Related to the Parties’ Dispositive**
9 **Motions and the Court’s Ruling on Those Motions**

10 The Court should exclude any reference to the fact that Dearborn National filed a Motion
11 for Summary Judgment, as well as evidence of Plaintiff’s Motion for Partial Summary Judgment,
12 or that the Court has denied or granted these motions, or any part thereof. Any such evidence is
13 wholly irrelevant to any of the extant claims in the case and would be highly prejudicial insofar
14 as it could give the erroneous impressions to jurors unfamiliar with the summary judgment
15 standard that the Court’s failure to dismiss Dreis’s claims in their entirety means that those
16 claims somehow have legal merit. Fed. R. Evid. 401, 402, 403.

17 **J. Plaintiff’s Counsel Should Not Be Permitted to Use Deposition Excerpts**
18 **Other than From Dearborn’s Rule 30(b)(6) Representative**

19 Plaintiff’s counsel has indicated that they intend to designate deposition testimony for use
20 at trial. Plaintiff’s counsel’s use of excerpts of depositions in this case should be limited to (a)
21 depositions of witnesses who are truly unavailable to testify in person, and (b) those used solely
22 for impeachment, or (c) use of the deposition of Dearborn’s Rule 30(b)(6) corporate
23 representative, which may be used for “any purpose.” In particular, use of video recordings of
24 depositions outside of these categories, including use of such recordings during opening
25 statements and closing arguments, is not consistent with the Federal Rules of Civil Procedure,
26 has the potential to confused and mislead the jury, and should be restricted.

 Federal Rule of Civil Procedure 32(a) sets forth the specific “conditions” under which

1 “all or part of a deposition may be used against a party” at “a hearing or trial.” Under that rule,
2 in order to use a deposition recording at trial, the party seeking to use the deposition must
3 demonstrate either that the use of the deposition is for impeachment, that the deposition is of a
4 party, agent, or designee, or that the deponent is unavailable to testify at trial. Fed. R. Civ. P.
5 32(a)(1)(C), (a)(2)–(4). “The preference for live testimony at trial rather than deposition
6 testimony as a substitute is uniformly stressed in case law.” *Young & Assocs. Pub. Relations,*
7 *L.L.C. v. Delta Air Lines, Inc.*, 216 F.R.D. 521, 522 (D. Utah 2003). Indeed, where an adverse
8 party indicates that they will make available a deponent to testify live at trial, even if that
9 deponent lives outside of the reach of the subpoena power, it is inappropriate to allow the
10 introduction of testimony by deposition rather than by requiring live examination of the witness.
11 *Id.* at 524.

12 Here, Dearborn National has no objection to the use of deposition excerpts for
13 impeachment purposes. Such use is consistent with Rule 32. Dearborn National also has no
14 objection to the use of excerpts of the transcript of its Rule 30(b)(6) corporate representative’s
15 deposition, which Rule 32(a)(3) provides may be used for “any purpose.” And, if deponents are
16 truly unavailable to be examined in person at trial, the use of deposition excerpts would likely be
17 appropriate in that instance as well.

18 What is not appropriate, however, and what the Court should not permit, is the use by
19 Dreis’s counsel of highly edited excerpts of deposition transcripts or video recordings for
20 purposes not identified in Rule 32, including during opening statements and closing arguments.
21 To the extent Dreis’s counsel intend to utilize excerpts of deposition recordings of deponents
22 who are otherwise available to testify in person during their case-in-chief, such use is
23 inconsistent with the federal civil rules and the case law interpreting them. To the extent
24 Plaintiff’s counsel intends to use deposition excerpts, including video recording excerpts, in
25 opening statements or closing arguments, such use has the potential to mislead the jury by
26 removing the context for questions, answers, or objections of counsel, and thus should be

1 prohibited under Federal Rule of Evidence 403. Further, such use is not consistent with Federal
2 Rule of Evidence 106, insofar as defense counsel will not have the ability to determine in
3 advance which portions of deposition transcripts or recordings Dreis's counsel would select for
4 inclusion in opening statements or closing arguments, and thus would be unable to properly
5 identify other portions of the transcripts or recordings that in fairness should also be considered,
6 as required by the rule.

7 The Court should prohibit the use of deposition excerpts at trial, including video
8 recording excerpts, other than (a) for impeachment, (b) the deposition recording of Dearborn
9 National's Rule 30(b)(6) designees, and (c) upon a showing by Dreis's counsel that the deponent
10 for whom excerpts are sought to be presented is truly unavailable to testify in person at trial.

11 V. CONCLUSION

12 Based on the foregoing, Dearborn National respectfully requests that the Court exclude
13 evidence of the types set forth above. A proposed order accompanies these motions.

14 Dated: July 27, 2015

17
18 /s/ Thomas P. Holt

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1 **CERTIFICATE OF SERVICE**

2 I am a resident of the State of Washington, over the age of eighteen years, and not a party
3 to the within action. My business address is One Union Square, 600 University Street, Ste. 3200,
4 Seattle, WA 98101. I hereby certify that on July 27, 2015, I electronically filed the foregoing
5 **DEFENDANT'S MOTIONS IN LIMINE** with the Clerk of the Court using the CM/ECF
6 system, which will send notification of such filing to the Honorable Marsha J. Pechman and to
7 the following:
8

9 **Attorneys for Plaintiff**

10 **Michael S. Wampold, WSBA #26053**
11 **Mallory C. Allen, WSBA #45468**
12 **PETERSON WAMPOLD ROSATO LUNA KNOPP**
13 **1501 Fourth Ave., Suite 2800**
14 **Seattle, WA 98101-1609**

15 I certify under penalty of perjury under the laws of the State of Washington that the
16 foregoing is true and correct.

17 Dated July 27, 2015

18 /s/ Thomas P. Holt

19 Thomas P. Holt

20 THolt@littler.com

21 **LITTLER MENDELSON, P.C.**

22
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24 Firmwide:134885613.3 075686.1002